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No. 75-1531

In the Supreme Court of the United States

OCTOBER TERM, 1975

OLIVER H. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court incorrectly charged the jury with respect to the element of willfulness in this prosecution for failure to file income tax returns.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of willfully failing to file income tax returns for the years 1968 and 1969, in violation of 26 U.S.C. 7203 (Supp. Tr. 61).[1] The court imposed concurrent prison sentences of six months on each count (Pet. 4). The court of appeals affirmed (Pet. App. 12-14).

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[1]"Tr." refers to the transcript of testimony at trial. "Supp. Tr." refers to the transcript containing the summations of counsel, the instructions to the jury, and the verdict.

The evidence produced at trial was as follows: Petitioner is a certified public accountant. During 1968 and 1969, he prepared and filed tax returns for clients but failed to file his own returns within the prescribed time limits. In January 1971, an agent of the Internal Revenue Service advised petitioner that the Service had no record of his having filed income tax returns for the years 1967 through 1969. On April 2, 1971, the Internal Revenue Service formally notified petitioner that it was conducting a criminal investigation of him. In June 1971, petitioner filed tax returns for 1968 and 1969. During the investigation petitioner told an Internal Revenue Service agent that his failure to file returns was the result of "stupidity and procrastination" (Tr. 274); and that it was his responsibility to file and he would have to take the responsibility for not doing so (Tr. 275).

Petitioner consulted a psychiatrist one year after he filed the tax returns (Tr. 214). The psychiatrist testified at trial that petitioner's failure to file the returns resulted from various personality defects and emotional problems. The psychiatrist stated that petitioner's "mental illness and because of the relationship between his mental illness and * * * [his wife's] mental illness * * * [resulted in his inability] to act in any other way than * * * he did" (Tr. 222-234).[2] A psychiatrist called by the government testified that since petitioner was able to function in the income tax area "in relationship to his clients, he must have been able to handle the same sort of problems in relation to his own affairs" (Tr. 285).

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[2]On cross-examination, petitioner's psychiatrist stated that it was his opinion that petitioner could not conform his conduct to the requirements of the law requiring the filing of tax returns "because of his own psychopathology and the pathology of his wife and the interaction between them" (Tr. 237).

On the issues of willfulness and mental capacity the district court charged the jury as follows (Supp. Tr. 45-47):

> "Willful" means voluntary and intentional and with the specific intent to do something the law forbids, or with a bad purpose to omit to do something the law requires to be done.
>
> In deciding whether the Defendant's failure to file the returns was willful, you must decide whether it constituted a voluntary, intentional disregard of a known legal duty.
>
> To act willfully in failing to file tax returns is to act in bad faith or with a bad purpose or evil motive or failing to do that which is known to be specifically required by law.
>
> If you find from the evidence the Defendant's failure to file tax returns was prompted by evil motive to omit to do something that he knew that the law required, then you could find that he acted willfully.
>
> "Evil motive" or "bad purpose," as those terms are used here, does not mean wicked or morally depraved motive or purpose. It means a conscious, deliberate, intentional refusal to do something the Defendant knows the law requires him to do.
>
> As indicated, the crime charged in this case requires proof of specific intent before the Defendant can be convicted.
>
> Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the Defendant knowingly—that is, voluntarily and intentionally and not because of mistake or accident or other innocent reason—knowingly committed an act which the law forbids, purposely intending to violate the law.

* * * * *

Under the Defendant's plea of not guilty there is an issue here as to his sanity at the time of the alleged offense.

The law does not hold a person criminally accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of a crime.

The sanity of the Defendant at the time of the commission of the alleged offense is an element of the crime charged and must be established by the Government beyond a reasonable doubt, just as it must establish every other element of the offense charged.

A Defendant is insane within the meaning of this instruction—these instructions—if at the time of the alleged criminal conduct, as a result of mental disorder or mental defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[3]

1. Petitioner contends (Pet. 5-7) that the trial court's instructions with respect to willfulness conflict with *United States* v. *Murdock*, 290 U.S. 389, and *United States* v. *Bishop*, 412 U.S. 346, because it charged the jury that "evil motive" or "bad purpose" does not mean "wicked or morally depraved motive or purpose." But nothing in those decisions supports petitioner's

[3]Shortly after the jury began its deliberations it asked to be reinstructed on the issues of willfulness and insanity (Supp. Tr. 57). The court thereupon reread the instructions, substantially as quoted above (Supp. Tr. 58-60).

argument (Pet. 6-7) that "willfulness" means conduct prompted by moral depravity. Indeed, the jury charge here is in complete accord with this Court's statement in *Bishop* that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). See also *Spies* v. *United States*, 317 U.S. 492, 497-498.[4]

There is likewise no basis to petitioner's further argument (Pet. 7) that the trial court committed reversible error by failing to repeat in its supplemental instruction the admonition that petitioner could not be found guilty if the failures to file resulted from "mistake, accident or other innocent reason." The court's supplemental instruction (Supp. Tr. 58-60) included the statement that the jury must decide whether the failure to file "constituted a voluntary, intentional violation of a known legal duty" (Supp Tr. 58). This was sufficient to reaffirm in the jurors' minds that a guilty verdict could not be returned if the failure to file resulted from a mere mistake, accident or other innocent reason rather than from intentional wrongdoing.[5]

Petitioner further argues (Pet. 7) that under the evidence the jury could have found that petitioner's mental condition did not amount to insanity but did amount to

[4]The petition does not raise the question presented in our petition for a writ of certiorari in *United States* v. *Pomponio*, No. 75-1667, *i.e.*, whether the jury must be instructed that bad purpose or evil motive is an element of the offense and that "good motive" negates the element of willfulness necessary to support a conviction.

[5]Petitioner's reliance (Pet. 6) upon *Bollenbach* v. *United States*, 326 U.S. 607, is misplaced. There, the Court held that the supplemental instruction given by the trial court was substantively incorrect.

an innocent justification for his failure to file and that the district court's instructions improperly forced the jury to choose between finding him to be insane or his conduct to be willful. Apart from the fact that petitioner made no such objection at trial and did not raise the point in the court of appeals (see Rule 30, Fed. R. Crim. P.; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Duignan* v. *United States*, 274 U.S. 195, 200; *Husty* v. *United States*, 282 U.S. 694, 701, 702), the court's instructions were correct and in complete accord with petitioner's defense that he was unable to conform his conduct to the requirements of the law. See, *e.g.*, *United States* v. *Chandler*, 393 F.2d 920 (C.A. 4) (*en banc*); *United States* v. *Freeman*, 357 F.2d 606 (C.A. 2); *United States* v. *Shapiro*, 383 F.2d 680 (C.A. 7) (*en banc*).

2. Petitioner also argues (Pet. 8-10) that the prosecutors failed to comply with an order of the district court to produce copies of certain press releases issued by the Internal Revenue Service about this case. But the court in fact excused the government from compliance with this order (see Pet. 9).[6] Moreover, petitioner suffered no prejudice as a result of the Service's issuance of a press release or of any attendant pre-trial publicity. In selecting the jury, the trial judge asked each member of the jury on *voir dire* whether any of them had read anything about the case in the news media which would render them unable to be impartial jurors, and none of the members indicated that he had (Tr. of June 6, 1974, pp. 5-6).

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[6]The trial court denied petitioner's motion "to compel the government to produce it and put it in the file or exercise such appropriate sanctions and continue the case until they do produce it" (Tr. 4-5).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.